LIM BOON SAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) March 19, 1968]
[K.L. — Criminal Appeal No. 108 of 1967]

Penal Code, s. 218 — Public servant making incorrect entries with knowledge that person may be saved from legal punishment — Prosecution to prove that entries were incorrect and made with requisite intent or knowledge.

Evidence — Corroboration — Witness having purpose of his own to serve — Judge to direct mind on danger of convicting on uncorroborated evidence — Appellate court will not interfere if there was no miscarriage of justice.

The appellant, an inspector of police and a public servant was charged *inter alia* under section 218 of the Penal Code of making incorrect entries knowing that he would thereby save the registered owner and driver of a lorry from legal punishment. A lorry containing wet sand and suspected of being overloaded was brought to the police station to be weighed. The lorry was found to be in excess of 1 ton 4 cwt. 2 qt. of permissable laden weight. The excess weight was punched on weighing cards and recorded in the station diary.

Subsequently, the owner of the lorry met the appellant. The appellant altered the record of excess weight in the station diary to 0 ton 3 cwt. 1 qt. The altered weight was also recorded in the weight register and weighing cards. The appellant was convicted of offences under section 218 of the Penal Code. In an appeal against the conviction,

Held, dismissing the appeal against the conviction under section 218, Penal Code: (1) in order to sustain a conviction under section 218 of the Penal Code, it was not sufficient merely to prove that the entry was incorrect. It must be further proved that the entry was made with intent thereby to save, or knowing it to be likely that he would thereby save some person from legal punishment;

(2) in this case, there was ample evidence to show that the entries were altered without the lorry being weighed. The appellant had therefore made incorrect entries knowing them to be likely that he would thereby save the registered owner and the driver of the lorry from legal punishment;

(3) where a witness may be regarded as having a purpose of his own to serve, the judge must direct his mind on the danger of convicting on the uncorroborated evidence of such witness; but if there is clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of direction, the court will not interfere.

Cases referred to:—

(1) *Raghubansh Lal* v. *State of U.P.* [1957] S.C.R. 696.

(2) *R.* v. *Prater* [1960] 1 All E.R. 298.

(3) *R.* v. *Stannard* [1964] 1 All E.R. 34.

CRIMINAL APPEAL.

N. H. Chan for the appellant.

Hashim bin Majid (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: The appellant was an inspector in the Royal Malaysian Police Force and thus a public servant. He was tried with two charges for offences punishable under section 218 Penal Code, and with one charge for an offence punishable under section 204 Penal Code. He was convicted on all charges and has now appealed.

The facts of this case are very simple. On July 13, 1966 at about 10.50 a.m. traffic police constable 72 brought in a lorry containing wet sand which was suspected of being overloaded. On duty at the enquiry office were the sergeant-in-charge (P.W.1), a corporal (P.W.4), and a police constable (P.W.2). P.W.2 made an entry in the station diary regarding the said lorry (serial No. 7238, time 10.55 a.m.). The appellant was the duty officer. Inspector Sakunathan (P.W.5) then weighed the said lorry and found it to be in excess of 1 ton 4 cwt. 2 qt. of the permissable laden weight. The maximum permissable weight of the lorry was 8 tons. The excess weight was punched on the weighing cards (Exh. P3). Three such cards were issued, one to the driver of the said lorry, the second was affixed to the original report, and the third was inserted in the weight register. The excess weight was duly recorded by P.W.2 in the station diary (serial No. 7250, time 12.00 noon). No such entry was made in the weight register because it could not be traced at that time. The said lorry was released at about 12.10 p.m. with the direction that the excess load was to be transferred to another lorry. That was also entered in the station diary (serial No. 7254). In the afternoon the owner of the lorry came to see the appellant. As a result, the appellant confronted P.W.5 concerning the said lorry. P.W.5 told him that the lorry had already been weighed, action had been taken, and there was nothing that could be done. The appellant suggested that the lorry should be re-weighed. As P.W.5 was in a hurry to attend a funeral he told the appellant to do whatever he liked. At about 9.20 p.m. the appellant came to the enquiry office with two male Chinese. He asked P.W.1 for the keys to the weighbridge and these were handed to him. He left the building and returned twenty minutes later. He then took from P.W.1 the weight register and station diary and entered his office. He came out ten minutes later and returned the register and diary to P.W.1. P.W.1 discovered a new weighing card (Exh. P5A) attached to the weight register which bore the following entries:—

8 tons 3 cwt. 1 qt. 7 lbs.
8 tons 0 cwt. 0 qt. 0 lbs.
0 tons 3 cwt. 1 qt. 7 lbs.

He also discovered that the excess weight as recorded in the station diary, viz. 1 ton 4 cwt. 2 qt., had been amended to read 0 ton 3 cwt. 1 qt. The learned magistrate was satisfied that the entries in the station diary (serial No. 7250) and in the weight register were made by the

appellant. He accepted the evidence of P.W.1 and P.W.3 and after duly considering the whole case came to the conclusion that the appellant had made incorrect entries knowing them to be likely that he would thereby save the registered owner and driver from legal punishment.

With regard to the offences punishable under section 218 Penal Code, two points requires consideration.

First, it was argued that the prosecution had failed to prove that the station diary and the weight register were framed in a manner which the appellant knew to be incorrect. It is well established that in order to sustain a conviction under section 218 Penal Code it is not sufficient that the entry is incorrect, it is essential that the entry should have been made with intent thereby to save, or knowing it to be likely that he will thereby save any person from legal punishment (see *Raghubansh Lal* v. *The State of U.P.*[1]). It was therefore submitted that in the present appeal the primary question is whether the appellant did weigh the said lorry. If he did not, then it was submitted the entries were false. If he did, then the prosecution must prove that the entries were false. The only link in the evidence which connected the appellant with the offence was the evidence of P.W.1, who counsel had labelled as an unreliable witness. The learned magistrate on the other hand had placed reliance on his evidence. He was of the view that he had no reason to doubt his evidence. P.W.1 testified that if the said lorry was brought back to the station that night he would inevitably have seen it. That is a matter of inference for the trial court and the question is whether it is a necessary inference deducible from the facts. It is not in dispute that the only access to the weighbridge after office hours was by way of the only gate leading to the police station and that gate was situated directly in front of the enquiry office. Anybody on duty in the enquiry office would certainly have noticed it if it was brought back that night, for it was not a small thing but an 8-ton vehicle. Further, P.W.1 would, as a matter of duty, have made an entry in the station diary if such an event had taken place. The learned magistrate also took the view that the new weighing card (Exh. P5A) was fabricated by the appellant since the evidence of P.W.5 clearly indicated that a weight card could be punched a the weighbridge without any lorry being placed on it. In my view there is ample evidence in the case to sustain the findings of the learned magistrate that the said lorry was not weighed that night if he believed P.W.1 and P.W.5 as apparently he did, having seen and heard them.

The next contention of counsel was this. It was submitted that P.W.3 was an accomplice. His evidence showed that he was told by the appellant that the said lorry belonged to the appellant's friend and that he was to keep quiet about the first report that he made earlier in the morning. As a result he was asked by the appellant to alter his pocket diary with regard to the weight of the said lorry. In such situation, counsel argued that since there was ample evidence to suggest that P.W.3 was an accomplice the learned magistrate ought in the nature of things to have approached his evidence with a sense of caution. As the learned magistrate had failed to direct his mind on accomplice evidence, the conviction must be set aside. It cannot be said that P.W.3 had under any circumstances to obey the unlawful orders of his superior. He is not that unintelligent enough to be able to distinguish between what was right and what was wrong. In any event I am of the opinion that more than that is required to cloak him with the garment of an accomplice. At the very highest, I consider him as a witness having a purpose to serve, and therefore the warning against uncorroborated evidence should be given. However, in the final analysis, the rule being only a rule of practice, each case must be looked at in the light of its own facts and that, if there be clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction, the court will not interfere: (see *R.* v. *Prater*[2]; *R.* v. *Stannard*[3]). In my opinion, there was ample and overwhelming evidence of a compulsive nature which would have enabled the court to arrive at the conclusion that the conviction under section 218 Penal Code ought to be set aside. No injustice can possibly have flowed from the absence of such warning.

I shall now consider the conviction under section 204 Penal Code. Counsel argued that there was only the evidence of P.W.3 to connect the appellant with the offence. That point is tenable. Having ruled that he was a witness having a purpose to serve, is there other independent and cogent evidence to establish his guilt? I am satisfied and so hold that in this instance the prosecution had failed to prove the charge.

The appeal against conviction under section 218 Penal Code is dismissed.

The appeal against conviction under section 204 Penal Code is set aside and the fine which was paid is to be refunded.

Order accordingly.

Solicitors: *Cheang Lee & Ong.*